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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 992

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

against

LAURA MOSS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petition is made by Atlantic Coast Line Railroad Company. Your petitioner respectfully prays that a writ of certiorari issue from this Court to review the judgment or order of the United States Circuit Court of Appeals, for the Second Circuit, entered herein November 12, 1946, reversing the judgment of the United States District Court, for the Southern District of New York, which had dismissed the complaint herein and remanding the cause to that Court (R. 37).

Opinions Below.

The opinion of the District Court is reported at 67 F. Supp. 38 (R. 26-28).

The opinion of the Circuit Court of Appeals is reported at 157 F. 2d 1005 (R. 31-36).

Statement of Facts.

Respondent is a resident of the State of Pennsylvania. Petitioner is a Virginia Corporation and a common carrier by rail, engaged in interstate commerce. Its legal principal office is in the State of Virginia and its principal operating office is at Wilmington, North Carolina. It operates a line of railroad extending from various points in the States of Alabama and Florida northward to Richmond, Virginia, and Norfolk, Virginia, the northern termini of its road. It owns no railroad tracks nor do its crews operate any trains north of Richmond, Virginia. It maintains an office at 71 Broadway, in New York City, for the purpose of attending to financial matters pertaining to the railroad, and offices at 16 East 44th Street and 342 Madison Avenue, in New York City, solely for the purpose of soliciting freight and passenger traffic over its railroad, commencing at Richmond, Virginia. It is not licensed to carry on its business in the State of New York nor has it at any time designated an agent in the State of New York to accept service of process on its behalf (R. 10).

Respondent instituted suit against petitioner in the Supreme Court of the State of New York, County of New York, by service of a summons and complaint upon an Assistant Secretary of petitioner at its offices at 71 Broadway, New York City, on January 16, 1946, to recover for

personal injuries alleged to have been sustained by her on December 16, 1944, while a passenger on a train of petitioner at or near Rennert, North Carolina (R. 9).

Prior to the institution of this suit, respondent had brought an action against petitioner on the same cause in the United States District Court for the Southern District of New York. Upon motion of petitioner, this action was dismissed by the District Court on the ground of improper venue. On appeal to the Circuit Court of Appeals for the Second Circuit, this dismissal was upheld *Moss* v. *Atlantic Coast Line Railroad Company,* 149 F. 2d 701 (R. 10-11).

The necessary diversity of citizenship being present in the case at bar, petitioner removed this action from the State Court to the United States District Court for the Southern District of New York. After removal to the District Court and before answering, petitioner moved under Rule 12 (b) of the Federal Rules of Civil Procedure, to dismiss the complaint on three grounds: (1) On the ground of improper venue, the action being one between a citizen of the State of Pennsylvania and a Virginia Corporation, neither party residing in the Southern District of New York as required by 28 U. S. C. A. § 112; (2) That the question of venue in this suit is *res judicata,* having previously been decided adversely to respondent by the District Court and by the Circuit Court of Appeals for the Second Circuit and (3) For the Court to retain jurisdiction of this cause of action would constitute an undue burden on interstate commerce and violate the Commerce Clause of the Constitution of the United States (R. 6-14).

After hearing argument, the District Court granted the motion of petitioner in all respects (R. 26-28). From the Judgment, dismissing the complaint herein (R. 4-5), respondent appealed to the Circuit Court of Appeals for the

Second Circuit. That Court, in an opinion by Hon. Harrie B. Chase, Circuit Judge, reversed the judgment of the District Court (R. 31-36) and remanded the cause to that Court in accordance with its opinion (R. 37).

The Circuit Court in reversing the District Court held that the venue of the action was proper, under 28 U. S. C. A. § 72; that its prior decision affirming the dismissal of the complaint in the suit originally instituted by the respondent in the District Court was not *res judicata* in this suit, on the ground that a different issue was decided and further that the defense by petitioner of this suit in New York would not unduly burden interstate commerce.

The Statute of Limitations of the State of North Carolina for the maintenance of actions to recover for personal injuries is three years (R. 13). Prior to December 16, 1946, respondent instituted suit on this same cause of action in the Superior Court of New Hanover County, North Carolina, which suit is still pending.

Basis of Jurisdiction.

The order of the Circuit Court of Appeals for the Second Circuit was entered on November 12, 1946 (R. 37). 157 F. 2d 1005 (R. 31-36).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., §347 (a)).

Statutes Involved.

The issues involve Sections 29, 38 and 51 of the Judicial Code (28 U. S. C. A., Sections 72, 81 and 112) as well as Rules 12 (b), 81 (c) and 82 of the Federal Rules of Civil Procedure set forth in the appendix.

Questions Presented.

1. In a removed action, may the defendant object to the venue thereof by motion before answer in the District Court on the ground that neither party is a resident of the District as required by 28 U. S. C. A., §112?

2. Where the question of venue has been decided adversely to a plaintiff in an action originally brought by her in a District Court and affirmed on appeal by the Circuit Court of Appeals, is this determination *res judicata* on a motion by defendant in the District Court to dismiss for improper venue on a subsequent action between the same parties on the same cause originally instituted in a State Court and removed by defendant to the District Court on the ground of diversity in citizenship?

3. Is it an undue burden on interstate commerce and violative of the Commerce Clause of the Constitution of the United States (Article 1, §8) to compel a railroad corporation engaged in interstate commerce to defend a removed action in a District Court situated in a state in which neither party is a resident, in which the cause of action did not arise, in which the defendant railroad does not have any tracks nor operate its railroad and in which its only activities are attending to certain financial details and soliciting freight and passenger traffic to be transported in interstate commerce outside of the state in which suit was instituted, the cause of action not having arisen out of any business transacted by the railroad in that state?

Reasons Relied on for Allowance of the Writ.

1. As to the question of improper venue:

There should be an authoritative ruling by this Court as to the extent to which the Federal Rules of Civil Procedure have affected the manner in which a defendant may attack the venue of a removed action.

The Circuit Court has decided in this case that the Federal Rules of Civil Procedure did not change the statutory provisions relating to venue.

It is important that there be an interpretation by this Court as to whether the provisions of Rule 81 (c) of the Federal Rules of Civil Procedure, making such rules applicable to civil actions removed to the District Courts of the United States and governing all procedure after removal, and Rule 12 (b) authorizing a defendant to raise the question of "lack of jurisdiction over the subject matter" and also the question of "improper venue," permit a defendant to question the venue of an action removed by it to the Federal Court on the ground of non-residence of both parties.

The precise question passed upon by the Circuit Court in the case at bar as to the right of the petitioner to raise the question of improper venue after removal, has not been decided by this Court since the Federal Rules of Civil Procedure became operative.

2. As to the question of undue burden on interstate commerce:

The Circuit Court has decided herein an important question of federal law in a way probably in conflict with the applicable decisions of this Court.

In deciding that the retention of jurisdiction of this action by the District Court of New York does not constitute an undue burden on interstate commerce, the Circuit Court has departed from the rule laid down in various decisions of this Court, and of the Court of Appeals of the State of New York on facts essentially similar, notably:

Davis v. *Farmers Cooperative Equity Company*, 262 U. S. 312 (1923);

Atchison, Topeka & Sante Fe Railway Co. v. *Wells, et al.*, 265 U. S. 101 (1924);

Michigan Central Railroad v. *Mix, et al.*, 278 U. S. 492 (1929);

Denver & Rio Grande Western Railroad Co., et al. v. *Terte*, 284 U. S. 284 (1932);

Matter of Baltimore Mail Steamship Co. v. *Fawcett, et al.*, 269 N. Y. 379 (1936) certiorari denied;

Madsen v. *Baltimore Mail Steamship Co.*, 298 U. S. 675 (1936);

and has applied the rule announced in *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511 (1934), and *St. Louis B. & M. Railway Co.* v. *Taylor*, 266 U. S. 200 (1924), which cases are distinguishable on the facts.

Summary of Argument.

I. Petitioner by removing this action from the State Court to the District Court did not waive its right to raise the question of improper venue.

II. In the absence of a change of status of the parties, the prior decision of the Circuit Court on the question of

venue applies equally to the removed action between the same parties.

III. The Circuit Court failed to give effect to the applicable decisions of this Court and of the Court of Appeals of the State of New York in determining whether the retention of jurisdiction of this action by the District Court would unduly burden interstate commerce and violate the Commerce Clause of the Constitution.

ARGUMENT.

POINT I.

Petitioner by removing this action from the State Court to the District Court did not waive its right to raise the question of improper venue.

The necessary diversity of citizenship being present, the petitioner exercised a privilege unconditionally conferred by statute and removed this cause to the District Court. The district to which it was necessary to remove the action is fixed by Section 29 of the Judicial Code, 28 U. S. C. A. § 72, in this instance the Southern District of New York. Once removed, Section 38 of the Judicial Code, 28 U. S. C. A. § 81 became effective. This section provides that:

> "The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court."

In addition, Rule 81 (c) of the Federal Rules of Civil Procedure provides that these rules apply to civil actions removed to the district courts of the United States and govern all procedure after removal.

Rule 12 (b) provides that the following defenses, among others, may at the option of the pleader be made by motion:

> "(1) lack of jurisdiction over the subject matter • • • (3) improper venue. • • •"

Relying on these provisions of the Judicial Code and of the Federal Rules of Civil Procedure, petitioner, after removal, and "proceeding therein as if the suit had been originally commenced in said district court" moved to dismiss the complaint on the ground of improper venue, neither of the parties to the action being residents of the Southern District of New York as is required by Section 51 of the Judicial Code (28 U. S. C. A. § 112).

In the case of *Freeman* v. *Bee Machine Co., Inc.*, 319 U. S. 448 (1943) this Court stated at page 452:

> "The jurisdiction exercised on removal is original not appellate."

In the *Freeman* case, *supra,* this Court also indicated that if the petitioner had not waived his objection to the venue of that action by his failure to assert it seasonably, and also, in effect, by submitting to the jurisdiction of the federal court by entering a general appearance after the removal and defending on the merits and filing a counterclaim, his objection thereto might have been sustained. Both the majority and dissenting opinions in that case seem to agree that the fact of removal in and of itself did not preclude the petitioner from raising the question of improper venue.

See also *Greenberg* v. *Giannini, et al.*, 140 F. (2d) 550, 152 A. L. R. 966 (1944), and annotation on the topic:

> "Defendant's removal of action from state to federal court as waiver of defect in federal venue"

commencing at page 972. At page 978 the author makes this significant observation:

> "The foregoing discussion has been confined to judicial authority upon the subject under annotation. However, this authority should be considered in the light of possible application of the Federal Rules of Civil Procedure, although the effect of the rules upon the question of waiver of venue by removal apparently has not yet been judicially determined."

Also at page 989, under subheading of this annotation, designated "Under Federal Rules of Civil Procedure" the author states:

> "While there has apparently been no judicial expression as to the applicability of the Federal Rules of Civil Procedure to the subject under annotation, the reader's attention is directed to a few of the rules which may be said to be pertinent. Such rules, which became effective September 16, 1938, are in part as follows:"

(Reference is then made to various rules, including 12(b), 81(c) and 82.)

Petitioner has, from the inception of the litigation conducted by respondent, consistently taken the position that the venue was improper, raising the question before answer in both the original suit commenced by respondent in the District Court and in the case at bar after it had been removed to the District Court. There is, therefore, no question of loss of this personal privilege by failure to assert it seasonably, by formal submission, or by submission through conduct.

Further, in the *Freeman* case, *supra*, this Court, referring to Judicial Code, §38, 28 U. S. C. A. 81, stated at page 452:

> "While that section does not cure jurisdictional defects present in the State Court action, it preserves to the federal District Courts the full arsenal of authority with which they have been endowed. Included in that authority is the power to permit a recasting of pleadings or amendments to complaints in accordance with the federal rules."

This was a question not theretofore authoritatively decided by this Court. Similarly the precise question raised by the petitioner herein, the propriety of a defendant objecting to the venue of a removed action, under 28 U. S. C. A., §112, has not been decided by this Court since the Federal Rules of Civil Procedure became effective in 1938, and it is submitted that the decision of the District Court sustaining petitioner's objection to the venue herein was correct and the judgment of the Circuit Court reversing that decision should be reviewed by this Court.

POINT II.

In the absence of a change of status of the parties, the prior decision of the Circuit Court on the question of venue applies equally to the removed action between the same parties.

Between December 9, 1944, when respondent instituted suit against petitioner in the District Court, which suit was dismissed for improper venue, and January 16, 1946, when suit on the same cause was instituted in the State Court, there was no change in the status of the parties. Respondent was at all times a resident of the State of Pennsylvania and defendant a Virginia corporation.

With the exception that in her complaint in the State Court action, the respondent omitted the allegations that she is a citizen of Pennsylvania and resides at Pittsburgh,

Pennsylvania; that the defendant is duly licensed to carry on its business in the State of New York and duly designated an agent in the State of New York to accept service of process on its behalf; that diversity of citizenship exists and that the amount in controversy exceeds $3,000, exclusive of interest and costs, the complaint in the case at bar is identical with the complaint filed in the District Court action which was dismissed on the ground of improper venue, such dismissal being upheld by the Circuit Court.

It is petitioner's contention that the prior determination of the Circuit Court of Appeals in *Moss* v. *Atlantic Coast Line Railroad Co.*, 149 F. (2d) 701 (1945) settled once and for all the question as to the venue of suits against the petitioner in the Southern District of New York by non-residents, whether originally instituted in the District Court or removed thereto by petitioner from the State Court. This finds support, both in Section 38 of the Judicial Code, 28 U. S. C. A. § 81, and in Section 81 (c) of the Federal Rules of Civil Procedure.

There was a change of status of the parties in the cases of *Young* v. *Higbee Co.*, 324 U. S. 204 (1945) and *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (1941), cited by the Circuit Court in support of its holding that on the prior appeal, by respondent, a different issue was decided, namely, the proper venue of an original action brought in the district court. In those two cases, the prior adjudications urged upon this Court as a bar were against parties acting individually rather than as representatives of a class. Here, the respondent, individually, was the sole plaintiff in each action, and the relief sought in each instance was identical. She should not be permitted to circumvent the binding effect of the ruling of the Circuit Court on the question of venue, by the transparent device of com-

mencing another action on the same cause in the Supreme Court of the State of New York. Neither should petitioner be penalized by not being permitted to raise the question of improper venue after removal to the District Court.

The District Court, after considering the matter carefully, found the prior decision of the Circuit Court was *res judicata* on the question of venue, and its finding is sustained by reason and logic and gives effect to the applicable venue provisions of the Judicial Code and the Federal Rules of Civil Procedure.

POINT III.

The Circuit Court failed to give effect to the applicable decisions of this Court and of the Court of Appeals of the State of New York in determining whether the retention of jurisdiction of this action by the District Court would unduly burden Interstate Commerce and violate the Commerce Clause of the Constitution.

In holding that the maintenance of this suit against petitioner in the District Court would not unduly burden interstate commerce, the Circuit Court, in its opinion (R. 35) stated:

> "The question here presented accordingly boils down to this. Is the maintenance of a removed suit which, by hypothesis, was one that the defendant, but for the removal, would have had to defend in the state court an undue burden upon interstate commerce?"

In answer to that question it held that the maintenance of this suit by the petitioner would not unduly burden interstate commerce.

The question is not as simple as all that. True, the Court of Appeals of the State of New York has held in the case of

Gregonis v. *Philadelphia & Reading Coal & Iron Company,* 235 N. Y. 152 (1923), that as to non-residents the courts of the state may, in the exercise of their discretion, refuse to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state. And the same court has also held in the case of *Murnan* v. *Wabash Rwy. Co.,* 246 N. Y. 244 (1927), that the courts of New York are invested with discretion to decline jurisdiction of an action brought under the Federal Employer's Liability Act by a non-resident of the State of New York against a foreign railroad corporation doing business in the State of New York at the time of the commencement of the action.

However, in a later decision of the Court of Appeals, *Matter of Baltimore Mail S. S. Co.* v. *Fawcett,* 269 N. Y. 379 (1936) (certiorari denied in *Madsden* v. *Baltimore Mail S. S. Co.,* 298 U. S. 675) it specifically held that the exercise of jurisdiction in a negligence action by a non-resident plaintiff against a foreign corporation by the courts of New York would be an unreasonable burden upon interstate commerce conducted by the defendant which is not warranted by the requirements of orderly, effective administration of justice. In that case, suit was instituted in New York by plaintiff to recover for injuries sustained by him in Norfolk, Virginia. At the time of the accident plaintiff was not employed in the State of New York, nor a resident there, and the defendant was a foreign corporation engaged in interstate and foreign commerce outside the State of New York, and carried on no activities in the State except to solicit business for commerce which did not touch the State.

Thus it will be seen that while the courts of New York have general jurisdiction of transitory causes of action arising outside of the State, even though the plaintiff may not have been a resident of the state where the cause of

action arose and the defendant may be a foreign corporation, it follows the authorities of this Court in determining whether or not maintenance of the action in the State of New York constitutes an undue burden on interstate commerce.

Reliance is placed by the Circuit Court on the case of *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511, but it is submitted that the facts of that case are clearly distinguishable from those in the case at bar. The cause of action there sued upon arose in the State of Minnesota and the defendant, a carrier by water, actually carried on its business of transportation in that State. At page 520 this Court said:

> "The defendant, though an interstate carrier, does not do business like a railroad company along a changeless route. It is engaged in transportation in Minnesota as much as it is engaged in transportation anywhere, if we exclude the activities of management that have their centre in Ohio."

This clearly distinguishes that case from the case at bar.

The rule set forth by this Court in *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312 (1923), is summarized succinctly at page 317 as follows:

> "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside."

Similarly, the exceptions are also clearly set forth at page 316, where this court said:

> "It may be that a statute like that here assailed would be valid although applied to suits in which the

> cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the State, or if the plaintiff was, when it arose, a resident of the State."

Neither is the fact that service of process on petitioner was made in the State of New York conclusive. As was aptly said by this Court in the case of *Denver* v. *Rio Grande Western R. R. Co., et al.* v. *Terte,* 284 U. S. 284 (1932) at page 287:

> "Obviously, the burden and expense which the carrier must incur in order to make defense in a State where the accident did not occur has no relation to the nature of the process used to bring it before the court."

Nor is the case of *St. Louis B. & M. R. R. Co.* v. *Taylor,* 266 U. S. 200 (1924), relied on by the Circuit Court, applicable. In that case suit was instituted in the State of Missouri. The plaintiff-consignee had a usual place of business within the State. The shipment out of which the cause of action arose was of goods deliverable in Missouri, and as this Court stated at page 207:

> "and for aught that appears the negligence complained of occurred within Missouri."

The case of *Canadian Pacific Rwy. Co.* v. *Sullivan, et al.,* 126 F. 2d 433 (C. C. A. 1, 1942), involved a suit by a plaintiff who was a resident of Massachusetts, the state in which suit was instituted.

In holding, as it did, that the maintenance of this action in the District Court for the Southern District of New York did not constitute an undue burden on interstate commerce, the Circuit Court decided an important question of federal

law in a way probably contrary to the applicable decisions of this Court on the subject, namely:

Davis v. *Farmer's Cooperative Equity Company*, 262 U. S. 312 (1923);

Atchison, Topeka & Santa Fe Railway Co. v. *Wells, et al.*, 265 U. S. 101 (1924);

Michigan Central Railroad v. *Mix, et al.*, 278 U. S. 492 (1929);

Denver & Rio Grande Western Railroad Co., et al., v. *Terte*, 284 U. S. 284 (1932).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue from this Court to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered herein November 12, 1946, reversing the judgment of the District Court for the Southern District of New York which had dismissed the complaint herein upon all of the grounds set forth in the petitioner's notice of motion.

Dated: February 1, 1947.

Respectfully submitted,

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Appendix.

JUDICIAL CODE:

"§72. (Judicial Code, section 29.) SAME; PROCEDURE. Whenever any party entitled to remove any suit mentioned in section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court."

"§81. (Judicial Code, section 38.) **Same; proceedings in suits removed.** The district court of the United States

shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal."

"112. (Judicial Code, section 51.) **Civil suits, arrests in; district where brought; suits by corporate stockholders.**

Except as provided in sections 113-117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113-118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found."

FEDERAL RULES OF CIVIL PROCEDURE:

"Rule 12. **Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.**

* * * * * *

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over

the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief."

• • • • • •

"Rule 81. APPLICABILITY IN GENERAL.

• • • • • •

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer. If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the record of the action is filed in the district court of the United States."

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"Rule 82. JURISDICTION AND VENUE UNAFFECTED.

These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 692

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

—against—

LAURA MOSS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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—against—

LAURA MOSS,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Respondent in Opposition

Opinions Below.

The opinion of the District Court for the Southern District of New York filed April 26th, 1946 (R. 26-28) is reported in 67 F. Supp. 38.

The opinion of the Circuit Court of Appeals for the Second Circuit filed November 12th, 1946 (R. 31-36, inc.) is reported in 157 F. 2d 1005.

Statement of Facts.

This action was brought in the Supreme Court of the State of New York to recover damages for personal injuries suffered by the respondent while riding as a passenger on one of the petitioner's trains from Florida to New York. The occasion of her injuries was a collision in North Carolina between the train on which respondent was riding and the derailed cars of another train operated by the petitioner (R. 15). Service in the action was regularly made, and the petitioner has voiced no objection to it. After removing the cause to the District Court of the United States for the Southern District of New York, the petitioner moved to dismiss for improper venue, *res adjudicata* and because the retention of jurisdiction would unconstitutionally burden interstate commerce. The District Court granted the motion on all grounds and the Circuit Court of Appeals reversed (R. 31; 157 F. 2d 1005).

Respondent is a citizen of Pennsylvania. Petitioner is incorporated in Virginia and runs trains between New York and Florida, both ways. It has no license to do business in New York, but it maintains offices there for the transaction of its financial affairs, for the sale of tickets, and for the solicitation of business (R. 22, 23). While petitioner does not regard itself as the operator of its own through trains in and out of New York, its reason appears to be only that between New York and Richmond, where its own roadbed begins, its trains use the rails and the crews of another carrier (R. 10). However that may be, the petitioner does in New York a substantial part of its interstate railroad business, as the court below found (R. 32), and the petitioner does not contend otherwise now.

Before instituting the present action, in the state court, the respondent brought a suit on the same facts in the District Court for the Southern District of New York. On the petitioner's motion, that suit was dismissed solely because jurisdiction was "founded only on the fact that the

action is between citizens of different states," in which event, as § 51 of the Judicial Code goes on to provide, "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (R. 18, 19, affirmed, 2 Cir., 149 F. 2d 701.)

On removing the present action, the petitioner set up the same objection, professing not to notice that § 51 of the Judicial Code has no application to anything except a suit originally brought in the district court. Regardless of having itself invoked the jurisdiction of the district court, the only district court which has jurisdiction on removal is, "the district court to be held in the district in which such suit is pending" (§ 29 of the Judicial Code; 28 U. S. C. A., Sec. 72). The petitioner nevertheless asserts that the venue is improper. There is nothing to support that assertion, and the Federal Rules of Civil Procedure have no relation to the subject. The companion argument about *res adjudicata* is equally without substance; nothing decided in the former suit is even remotely involved in this one.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals that the mandatory provisions of Section 29 of the Judicial Code (28 U. S. C. A., Sec. 72) were not modified in any respect by the enactment of the Federal Rules of Civil Procedure is correct.

Petitioner does not question that it was validly served with process in this action. The venue of a removed suit is determined by Section 29 of the Judicial Code (28 U. S. C. A. 72) which provides that removal shall be had "into

the district court to be held in the district where such su is pending."

It is a novel idea that Section 51 of the Judicial Co (28 U. S. C. A., Sec. 112) can apply to a removed actio

In *General Investment Co.* v. *Lake Shore & M. S. Co.*, 260 U. S. 261 (1922), at page 276, this Court wrote

> "* * * the venue on removal is specifically dea with and fixed by section 29."

In *Lee* v. *Chesapeake & Ohio R. Co.*, 260 U. S. 65 it said:

> "Section 51 of the Code relates to the venue suits *originally* begun in those courts, and provide subject to exceptions not material here, that— (655)
>
> * * * Section 29 deals, among other things, wi the venue on removals, and shows that in every i stance the removal *must* be into the district cou 'in the district where such suit is pending'; and th requirement is emphasized by section 53 * * *." (657.) (Italics supplied.)

See also *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific Rway Co.*, 270 U. S. 363.

Tennessee Valley Authority, et al. v. *Tennessee Electric Power Company, et al.*, 90 Fed. 2d 855 (6th Circuit 1937); certiorari denied 301 U. S. 710.

Petitioner erroneously contends that Rules 81(c) and 12(b) of the Federal Rules of Civil Procedure have modified the mandatory provisions of Section 29 of the Judicial Code. The identical argument was advanced with respect to Section 38 of the Judicial Code (28 U. S. C. A., Sec. 81), effective since 1901, and rejected by this Court.

Tootle, et al. v. *Coleman, et al.*, 107 Fed. 41; certiorari denied 183 U. S. 695.

Rule 82 of the Federal Rules of Civil Procedure is conclusive:

> "Rule 82. *Jurisdiction and venue unaffected.* These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

It is obvious, therefore, that the Federal Rules of Civil Procedure were not intended in any way to modify, amend or affect the venue provisions of the Judicial Code.

Petitioner devotes the major portion of its argument under Point I to a consideration of *Freeman* v. *Bee Machine Co., Inc.*, 319 U. S. 448 (1943). It does not contend that the decision is in point but rather that it is an indication of a prospective intent on the part of this Court to reverse its long standing interpretation of Section 29 of the Judicial Code. Speaking for the majority in that case, Mr. Justice Douglas emphasized that the question of venue was not before the court and might be waived if not seasonably asserted. He pointed out the distinction between fundamental jurisdictional defects, which may always be raised as a defense, and venue. In denying an application to amend the complaint to allege a cause of action under the Clayton Act, the Court held that as such cause could not have been pleaded in the state court, where the suit was instituted, plaintiff was barred from amending the complaint. Mr. Justice Douglas cited with approval *Lee* v. *Chesapeake & Ohio R. Co.*, 260 U. S. 653, and *Neirbo Co. et al.* v. *Bethlehem Shipbuilding Corporation, Inc.*, 308 U. S. 165.

In *Greenberg* v. *Giannini, et al.*, 140 Fed. 2nd 550, the only other decision relied upon by petitioner, Judge Learned Hand wrote with respect to venue:

> "* * * We infer that this has arisen from the assumption that upon removal those conditions of venue must exist in the district court which are required in an original action. That is, with deference, plainly a mistake; section 72 of Title 28 U. S. C. A. governs the venue of a removed action; section 112 has nothing to do with it" (p. 553).

II.

The dismissal of the action originally instituted in the District Court was not *res adjudicata* of the issue raised in this suit.

Under Point II of its memorandum petitioner fails to cite a single authority in support of its somewhat curious contention that the decision applying Section 51 of the Judicial Code to the former suit, originally brought in the district court, is a preclusive adjudication so far as this action is concerned.

In the prior action, originally instituted in the district court, the sole determination was the applicability of Section 51 of the Judicial Code (28 U. S. C. A., Sec. 112). In holding that the section required a dismissal, Judge Cox took pains to point out:

> "With this disposition, it is unnecessary to consider the second ground of the motion" (R. 19).

It is elemental that if issues involved in a suit are not identical, the doctrine of *res adjudicata* is inapplicable.

> *Young* v. *Higbee Company, et al.,* 324 U. S. 204 (1945).
> *Anderson* v. *Abbott,* 321 U. S. 349, 355 (1944).
> *Burley Irr. Dist.* v. *Ickes,* 116 Fed. 2d, 529, at p. 538; certiorari denied, 312 U. S. 687.

In *Missouri-Kansas Pipe Line Co.* v. *United States, et al.,* 312 U. S. 502, the appellant contended, among other things, that a decision on a prior motion was binding. Mr. Justice Frankfurter wrote:

> "The earlier denials involved different legal claims from that now asserted, and, therefore, are no bar to the present proceeding" (p. 508).

III.

The retention of jurisdiction of this action would not unduly burden interstate commerce nor violate the commerce clause of the Constitution.

Whether the defense of a particular action in a particular place would impose an unnecessary burden on interstate commerce is a question of fact.

> *International Milling Company* v. *Columbia Transportation Company,* 292 U. S. 511, 521.
>
> *St. Louis, S. W. Ry.* v. *Alexander,* 227 U. S. 218, 227.

That a trial of an action in the district court may impose some burden on a defendant is not sufficient in itself to warrant a holding that Article I, Section 8, of the Constitution of the United States would be violated. It must appear that an undue burden would be imposed. The record is totally barren of facts to support petitioner's assertion.

A similar situation was considered in *Canadian Pacific Railway Co.* v. *Sullivan, et al,* 126 Fed. (2d) 433 (1st Circuit 1942; certiorari denied, 316 U. S. 696). The court said at page 438:

> "The question in cases of this sort is not whether the requirement that a foreign carrier shall submit to suit in a state imposes some burden upon interstate commerce, it is whether that requirement imposes an unreasonable burden upon such commerce (citations). To solve this question no verbal formula is available. Each case must be considered as it arises, and prior decisions of the Supreme Court of the United States in cases involving the question are our only authoritative guides."

It might be observed that the railroad company contended in that case, as the petitioner does here, that its trains were not operated by it within the State of the forum but rather by the crew and over the tracks of a connecting carrier. That argument was held insufficient.

See also *Miles, et al.* v. *Illinois Central Railway,* 315 U. S. 698, 705.
Baltimore & Ohio Railroad Company v. *Kepner,* 314 U. S. 44, 54.

The petitioner does not question the validity of the service of process and it is certainly doing business in New York City (R. 22, 23).

Miles, et al. v. *Illinois Central Railway (supra),* at pp. 701, 702.
Barnett v. *Texas & P. Ry. Co.,* 145 Fed. (2d) 800.
Jacobowitz v. *Thompson, et al.,* 141 Fed. (2d) 72.

In the case at bar it is impossible to conceive how interstate commerce or the petitioner itself would be unduly burdened through the retention of jurisdiction in New York. Petitioner's trains run daily into Pennsylvania Station in New York City; its farthest crew lives overnight from the courthouse.

Finally the petitioner advances the absurd contention that the Federal court to which the petitioner removed this action should dismiss it because the state court would have had discretion to do so if the petitioner had elected to leave it there. Except where the Constitution forbids, a state court may decide for itself whether to dismiss or to entertain any transitory action arising outside the state and brought by a non-resident against a foreign corporation (*cf. Banque de France* v. *Supreme Court,* 287 N. Y. 483, 487). The only reason suggested by the petitioner for its asserted belief that the state court would have dismissed

this action is the notion that retention of the action would be an unconstitutional restraint on interstate commerce. That is, of course, a Federal question, and it has been answered by a Federal court on the facts of this particular case. The court below has found that no such burden would be imposed (R. 34).

CONCLUSION.

As nothing substantial is presented for review, the petition should be denied.

Dated: New York, March 3rd, 1947.

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